(2)

No. 88-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

STATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment prohibits elected officials from hiring public employees, substantially, but not wholly, based on broadly defined "political considerations."

2. Whether the First Amendment prohibits elected officials from promoting or granting desired transfers to public employees substantially, but not wholly, based on broadly defined "political considerations."

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Respondents, MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY and JAMES R. THOMPSON (collectively the "State Respondents"), respectfully request that this Court deny the petition for a writ of certiorari ("the Petition") seeking review of the Seventh Circuit's *en banc* opinion in this case.[1] The opinion of the Seventh Circuit

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[1] The Republican Party of Illinois, the Republican Party of each county of Illinois, Don W. Adams and Irvin Smith are also respondents in this proceeding. Counsel for these respondents have indicated that they intend to adopt the State Respondents' Brief In Opposition to the Petition.

is officially reported at 868 F.2d 943 (7th Cir. 1989) (en banc).[2]

JURISDICTION

The jurisdictional statement contained in the Petition includes substantial legal argument and is thus improper under Supreme Court Rule 21.1(e). This Court has jurisdiction to review the final judgment of the Seventh Circuit Court of Appeals under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Complaint

On July 1, 1985 plaintiffs Cynthia Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer and James Moore ("Plaintiffs") filed this action against Governor James R. Thompson and seven former or current state government officials, the Republican Party of Illinois and of each county of Illinois, and two Republican Party officials (collectively, "Respondents"). Plaintiffs allege that Respondents have maintained an employment system in which certain personnel decisions are "substantially motivated by political considerations." (R.A. 7, ¶ 11f.)[3] The "political consid-

[2] The opinion of the Seventh Circuit, on rehearing *en banc*, is appended to the Petition at A-1, and will also be cited herein ("A-[page number]").

[3] Although Petitioners purport to describe the allegations in the complaint throughout the Petition and even reproduce a section of the appendix to the complaint (Petition, at 8-9), they do not

(Footnote continued on following page)

erations" which Respondents allegedly take into account in the employment process are numerous and varied, and include the following (R.A. 7, ¶ 11f):

> ". . . whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson."

As a result of these broadly defined "political considerations," Plaintiffs claim that they have been denied certain jobs, promotions and transfers because they are not "politically acceptable or approved by Defendants" (*e.g.*, R.A. 4, ¶ 7a), and that "political and financial supporters of the Republican Party of the State of Illinois, are favored in regard to State of Illinois employment." (R.A. 2, ¶ 1.) Petitioner Moore alleges that he has unsuccessfully sought employment with the State since 1978 (R.A. 17, ¶ 23b), while three individuals allegedly affiliated with the Republican Party "have all been hired by State government in positions for which [he] was qualified." (R.A. 17, ¶ 23e.) Petitioner Moore does not allege that the candidates who were hired were unqualified for the state jobs, or that he was more qualified than these other candidates.

Petitioner Rutan alleges that since the fall of 1981 she has applied for promotions to supervisory positions within

[3] *continued*
provide supporting citations to the complaint or include a copy of the complaint in the Appendix. Because the Petition frequently exaggerates the allegations in the complaint, Respondents provide a copy of the complaint in Respondents' Appendix ("R.A.") at R.A. 1-26.

her department (R.A. 14, ¶ 19b), but that each position she sought allegedly was given to "someone less qualified but someone who was favored on a political basis by the Governor's Office of Personnel." (R.A. 14, ¶ 19g.) Petitioner Taylor also claims that he failed to obtain a promotion, which allegedly was awarded to another state employee "who was less qualified and had less seniority" but who had the support and approval of the Republican Party. (R.A. 15, ¶ 20c.) Petitioner Taylor claims that he has not received a desired transfer to another county, ostensibly on political grounds. (R.A. 15, ¶ 20f, g.)[4]

None of the Plaintiffs allege that they have been discharged, demoted, harassed or punished in any manner because of their political beliefs or affiliation. Nor do Plaintiffs allege that the individuals who received the particular jobs, promotions, or transfers which they themselves desired are unqualified under the Illinois Personnel Code. *Ill. Rev. Stat.* ch. 127, ¶ 63b101, *et seq.* (1985).

Plaintiffs allege that the employment system described in the complaint violates a number of federal and state

[4] Two of the Plaintiffs have not joined the petition for a writ of certiorari. (Petition, at ii n.2.) Plaintiff Standefer alleges that in November 1984 he was laid off from his temporary state position "along with five other employees." (R.A. 15, ¶ 21b.) Standefer does not challenge the layoff itself, but complains that the other employees who were laid off were offered other jobs in state government, while he was not. (R.A. 15, ¶ 21c.) Plaintiff O'Brien alleges that he was informed in December 1984 that he would be recalled from layoff. (R.A. 16, ¶ 22b, d.) However, he claims that he did not gain state employment until he obtained the support of the Republican Party. (R.A. 16, ¶ 22e, g.)

The Seventh Circuit plainly did not hold, as Petitioners suggest (Petition, ii n.2), that the claims of Standefer and O'Brien fall within this Court's ruling in *Elrod v. Burns*, 427 U.S. 347 (1976). *See Rutan*, 868 F.2d at 956; (A-27). The court remanded their claims to the district court to determine whether their failure to be rehired "was the substantial equivalent of a termination from employment." *Id.* at 956, 957, (A-27-28).

constitutional rights, including the rights of freedom of speech and association (R.A. 17, 18, 19, ¶ 24a, g, h), due process (¶ 24c, f), equal protection (¶ 24b, d, f), and a republican form of government (¶ 24e). Plaintiffs seek $1.002 billion in actual and punitive damages, and the imposition of a receivership "to take control of and operate the hiring and promotion system of the State of Illinois for departments, boards and commissions under the jurisdiction of the Governor." (R.A. 22, ¶ 12.)

B. Proceedings in the District Court

On May 23, 1986, after full briefing and argument, the district court dismissed the complaint in its entirety. (R. 73; R. 77, at 33-35.) On July 11, 1986, the district court issued a twenty-page order setting forth the basis for its judgment dismissing the complaint. *See Rutan v. Republican Party of Illinois*, 641 F. Supp. 249 (C.D. Ill. 1986).[5] The district court held that Plaintiffs failed to state a claim under the First Amendment because the alleged use of political considerations in hiring, promoting, transferring and rehiring state employees does not fall within this Court's limited holding in *Elrod v. Burns*, 427 U.S. 347 (1976), prohibiting the dismissal of public employees based solely on political belief. *Rutan v. Republican Party of Illinois*, 641 F. Supp. at 253; (C-5).

The district court determined that *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), were inapplicable because "any incidental effect that might flow from the use of political considerations in [the challenged] employment decisions does not trigger the analysis of *Keyishian* and other cases that involve direct restrictions on speech." 641

[5] A copy of the district court's decision is appended to the Petition at C-1, and also will be cited herein ("C-[page number]").

F. Supp. at 257; (C-13). Moreover, the court found that Plaintiffs' allegations do not "support a scenario of punitive actions based solely upon political belief." 641 F. Supp. at 255; (C-11). The district court emphasized that Petitioner Rutan has not alleged "that her failure to be promoted was directly related to her own political activity." *Id.* Likewise, there are no allegations that Petitioner Taylor "was being punished for speaking out on an issue of public concern," or that Petitioner Moore "was being retaliated against or punished for maintaining a certain stand or political position." *Id.* at 256; (C-11). According to the district court, Petitioners' allegations that other candidates received the jobs, promotions or transfers which they themselves desired did not constitute "punitive personnel actions in retaliation for their exercise of protected First Amendment speech." *Id.* at 255; (C-10).

C. Proceedings in the Seventh Circuit

In their subsequent appeal to the Seventh Circuit, Petitioners abandoned all but two of their claims: (1) their claim as applicants and employees that the alleged patronage system violated the First Amendment; and (2) their claim as voters that the alleged patronage system violated the Fourteenth Amendment by denying them equal access and effectiveness in elections. *See Rutan v. Republican Party of Illinois*, 848 F.2d 1396, 1399-1400 (7th Cir. 1988); (B-6-7).[6] By a 2-1 vote, a panel of the Seventh Circuit affirmed the district court's judgment that Petitioner Moore's allegations of "political hiring" did not state a constitutional claim. *Rutan v. Republican Party of Illinois*, 848 F.2d at 1408; (B-23). The panel remanded the claims of the plaintiffs/employees for a determination

[6] A copy of the panel opinion is appended to the Petition at B-1, and also will be cited herein ("B-[page number]").

whether the alleged employment actions complained of were "the substantial equivalent of dismissal." *Id.*[7]

After a rehearing *en banc*, the Seventh Circuit reinstated the panel majority's opinion virtually unchanged. *Rutan v. Republican Party of Illinois*, 868 F.2d 943 (7th Cir. 1989) (en banc); (A-1). Following its prior decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), and the decision of the Sixth Circuit in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the court ruled that the First Amendment does not prohibit elected officials from considering broadly defined political factors in hiring public employees. *Rutan*, 868 F.2d at 954-55; (A-24). In holding that Petitioner Moore failed to state a constitutional claim, the Seventh Circuit determined that the burdens which the alleged employment practices imposed on the First Amendment rights of job applicants did not rise to the level of a constitutional deprivation. *Id.* at 955; (A-24). The court reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." *Id.* at 954; (A-24). Furthermore, "[a]ny burden imposed on an employment applicant does not out-

[7] The panel affirmed, without dissent, the district court's dismissal on standing grounds of Plaintiffs' allegations, as voters, that the alleged employment system deprived them of "equal access and effectiveness of elections." 848 F.2d at 1411; (B-29). Following its prior decision in *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988), and the District of Columbia Circuit decision in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the Seventh Circuit concluded that "the injury asserted in the complaint is not fairly traceable to the challenged action." *Rutan*, 848 F.2d at 1412; (B-31). The *en banc* decision unanimously adopted this holding. *Rutan*, 868 F.2d at 958; (A-32).

Petitioners do not seek review of the Seventh Circuit's decision on this issue, and it is manifest that the Seventh Circuit's ruling on Petitioners' claims as voters is fully consistent both with this Court's precedents on standing and with decisions of other courts of appeal.

weigh the significant intrusion into state government required to remedy such a claim." *Id.* at 955; (A-24).

The court recognized that, with regard to existing employees, an open question remains "over whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment." *Id.* at 949; (A-13). To resolve the constitutionality of the promotion, transfer and rehiring claims alleged in the complaint, the panel adopted the "substantial equivalent of dismissal" test enunciated in *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980). *Rutan*, 868 F.2d at 951; (A-17).

The *en banc* court cited three principal reasons for adopting the *Delong* standard. *Rutan*, 868 F.2d at 952; (A-17-18). First, the *Delong* analysis properly takes into account this Court's limited holding in *Elrod* and recognizes that there is serious question as to the wisdom of further extending the reach of that decision. *Id.*; (A-17). Second, *Delong* recognized the substantial differences that exist between dismissals, which can disrupt settled expectations, and other employment practices. *Id.*; (A-17). Third, application of the *Delong* standard avoids the substantial intrusion of federal courts into the every day operations of state and local governments, while at the same time providing a remedy for an employee who can demonstrate that his or her failure to obtain a desired promotion, transfer or rehire imposes the same kind of burden as would the employee's outright termination. *Id.*; (A-17-18).

Although the court adopted the *Delong* analysis, it emphasized that the allegations in this case are substantially different from claims of political retaliation like those at issue in *Delong*. This case does not involve adverse employment actions taken to punish employees for the exercise of free speech. Here, Plaintiffs complain only that other employees were "favored" by their public employer.

(R.A. 2. ¶ 1.) Thus, the Seventh Circuit explained—as had the district court in *Rutan* and the Sixth Circuit in *Avery*—that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Rutan*, 868 F.2d at 954 n.4; (A-23 n.4).

Only one judge dissented as to the dismissal of Petitioner Moore's hiring claim. *Id.* at 959; (A-33). Only two judges dissented from the majority's adoption of the "substantial equivalent of dismissal" standard to govern the remaining claims of the Plaintiffs, including Petitioners Rutan and Taylor. *Id.* at 958-59; (A-33).

REASONS FOR DENYING THE WRIT

Petitioners claim that this case presents five separate questions for the Court to decide. (Petition, i.) Apparently, Petitioners believe that the likelihood of securing Supreme Court review is enhanced by asking the same questions several different ways. In fact, there are only two issues raised by the Petition. First, whether Petitioner Moore has alleged a cognizable claim under the First Amendment because he was not hired by the state, based in part on broadly defined "political considerations" which include the use of recommendations by friends or relatives of Republicans. Second, whether Petitioners Rutan and Taylor have stated a constitutional claim because they allegedly failed to obtain favorable treatment from their state employer, based in part on those same amorphous considerations.

Both the district court and the Seventh Circuit, sitting *en banc*, emphasized the significant difference between

Petitioners' allegations that certain favorable employment decisions are "substantially motivated" by a myriad of broadly defined "political considerations" (R.A. 7, ¶ 11f), and the imposition of punitive employment actions in direct retaliation for political belief or expression. *See Rutan*, 868 F.2d at 954 n.4; (A-23 n.4); 641 F. Supp. at 255, 257; (C-10-11, 13). In requesting Supreme Court review, Petitioners fail to recognize the different burdens imposed on the constitutional rights of the affected applicants and employees in the two distinct classes of cases. When the Seventh Circuit's decision is viewed in light of the allegations in the complaint, it becomes clear that review by this Court is unwarranted.

In Part I of this brief we show that the Seventh Circuit correctly applied the controlling precedents of this Court by considering, as a threshold matter, whether the alleged employment practices sufficiently implicate First Amendment rights to require additional constitutional scrutiny. The Seventh Circuit's holding that *Elrod* should be limited to practices that are determined to be "the substantial equivalent of dismissal" is faithful to both the letter and the spirit of that decision.

In Part II, we demonstrate that there is no conflict among the courts of appeal warranting a writ of certiorari. In Part II.A, we demonstrate that the analysis and judgment of the Sixth Circuit in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986)—the only other appellate decision to squarely confront the use of political considerations in the hiring process—is entirely consistent with the decision below. In Part II.B, we show that the Seventh Circuit's holding that the failure to obtain a desired promotion or transfer states a claim if it is tantamount to dismissal does not conflict with the decisions of any other court of appeal. Petitioners' attempt to manufacture such a conflict cannot be sustained in light

of the different facts alleged and legal claims asserted in the cases upon which they rely.[8]

I.

THE SEVENTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH THE CONTROLLING PRECEDENTS OF THIS COURT.

In *Elrod v. Burns*, 427 U.S. 347 (1976), a closely-divided Court held that a non-policymaking government employee may not be discharged or threatened with discharge solely because of his political beliefs. Writing for the three-Justice plurality, Justice Brennan recognized that "[a]lthough political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons." 427 U.S. at 353 (Brennan, J., plurality opinion).[9] The *Elrod* Court found that patronage practice runs afoul of the First Amendment only "to the extent it compels or restrains belief and association." *Id.* at 357. The Court reasoned that the dismissal or threat of dismissal from existing employment "unquestionably inhibits protected

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[8] In fact, for the reasons stated in the conditional Cross-Petition filed by the State Respondents, the Seventh Circuit should have affirmed the dismissal of Petitioners Rutan's and Taylor's claims that they did not receive favorable treatment from their public employer. *See* Cross-Petition For Writ of Certiorari To the Seventh Circuit Court of Appeals, *Frech v. Rutan*, No. 88-____, at 5-12.

[9] Justice Stewart's concurring opinion, joined by Justice Blackmun, confirmed the limited reach of *Elrod* (427 U.S. at 375) (Stewart, J., concurring): "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court reiterated that the only practice at issue in *Elrod* was the firing of public employees for partisan reasons. *Id.* at 513 n.7.

belief and association" and "penalizes its exercise," and thus raises a constitutional issue. *Id.* at 359. Only then did the Court consider whether there was adequate justification for this "unquestionable" effect; finding none, the Court held the practice of patronage dismissals unconstitutional. *Id.* at 373.

This is precisely the analysis applied by the Seventh Circuit in this case, both with respect to Petitioner Moore's claim as a job applicant and the claims of Petitioners Rutan and Taylor as existing employees. In the case of applicants for state employment, the Seventh Circuit first questioned whether the hiring practices alleged by Petitioner Moore sufficiently implicated First Amendment rights, before considering whether further constitutional analysis was required. The Seventh Circuit correctly held that any conceivable burden imposed by a failure to obtain a particular position "is much less significant than losing a job," (868 F.2d at 952; (A-18)), and is insufficient to raise a First Amendment question requiring constitutional analysis. After finding that the use of political considerations, as broadly defined in the complaint, fails to have the "unquestionable" effect that existed in *Elrod*, the Seventh Circuit correctly affirmed the dismissal of the hiring claim without proceeding to the next stage of the constitutional analysis.

Similarly, with respect to the claims of Petitioners Rutan and Taylor, the Seventh Circuit correctly held that a non-punitive denial of a desired transfer or promotion could not have the "unquestionable" effect on First Amendment rights underlying *Elrod* unless the denials were the "substantial equivalent of a dismissal." 868 F.2d at 955; (A-25). Only upon such a showing could a court proceed to the next step in the constitutional analysis and determine whether there is sufficient justification for the practice.[10]

Petitioners' suggestion that the Seventh Circuit improperly departed from "the analysis required by long established First Amendment jurisprudence" (Petition, at 20), is plainly incorrect. Petitioners' reliance on *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), is misplaced because, as a preliminary matter, those cases involved the dismissal or threat of dismissal of public employees for the exercise of constitutionally protected speech. In the instant case, there is no allegation that any state employee has been discharged or threatened with discharge.

More importantly, both courts below properly determined that the general principles of First Amendment jurisprudence established by *Pickering* and *Keyishian* do not control the issues raised by the allegations in Petitioners' complaint. *Rutan*, 868 F.2d at 954 n.4; (A-23 n.4); 641 F.

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[10] Recent decisions of this Court, although in the context of affirmative action plans, underscore the correctness of the Seventh Circuit's analysis that dismissals from employment have a far greater impact on individuals than do other types of employment decisions. *E.g.*, *Johnson v. Transportation Agency, Santa Clara County*, ___ U.S. ___, 107 S. Ct. 1442, 1455 (1987) (in upholding an affirmative action plan, the Court observed that "denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner"); *United States v. Paradise*, ___ U.S. ___, 107 S. Ct. 1053, 1073 (1987) (in upholding strict racial quotas on the hiring and promotion of Alabama state troopers, the Court distinguished the burdens imposed on individuals who fail to obtain jobs or promotions from the burdens endured by employees laid off or discharged); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 282 (1986) (in striking down a school board policy giving minority teachers preferential protection from layoff, the plurality noted that "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job").

Supp. at 257; (C-13). As the Sixth Circuit explained in *Avery v. Jennings*, 786 F.2d at 236: "Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech than when the burden on the protected activity is an incidental consequence of other legitimate governmental concerns." *See also Pieczynski v. Duffy*, 88-2381, Slip Op. at 4 (7th Cir., May 30, 1989) (R.A. 30) ("It is one thing to be a target of a campaign of retaliation, [it is] another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees"). (A copy of the Seventh Circuit's opinion in *Pieczynski* is appended hereto at R.A. 27-36.)

In short, the Seventh Circuit properly concluded that under the *Elrod* analysis, Petitioners' allegations that they were denied employment or favorable treatment by their public employer fail to state a cognizable constitutional claim. The alleged "patronage system" which Petitioners attack falls far short of intending or achieving the unquestionable effect underlying *Elrod*. Petitioners have not alleged that Respondents employ a "strict political test . . . designed to call attention to political differences and punish those who differ." *Avery*, 786 F.2d at 237. Instead, Petitioners claim only that certain personnel decisions are "substantially motivated" by a variety of "political considerations," some of which are wholly unrelated to political belief (*e.g.*, "a relative or friend of a Republican"). (R.A. 7, ¶ 11f.)

Neither *Elrod* nor its progeny justify extension of the ban on patronage dismissals to the very different situations alleged in the complaint. The Seventh Circuit analyzed each of Petitioners' claims by reference to the burdens allegedly imposed on their First Amendment rights. Such an approach is entirely consistent with the precedents of this Court and thus does not warrant review.

II.

THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEAL ON THE SPECIFIC ISSUES RAISED BY PETITIONERS IN THIS CASE.

In apparent recognition that the Seventh Circuit's decision comports fully with the controlling authorities of this Court, Petitioners principally argue that the decision "is in direct conflict with the decisions of other circuit courts of appeal." (Petition, at 12.) However, as we demonstrate in Section A, below, there is no conflict whatsoever on the issue of political hiring. The only other court of appeal to address this question has determined, on the basis of a system far more partisan than the system alleged in the complaint, that elected officials may take political considerations into account in making subjective hiring decisions. *Avery v. Jennings*, 786 F.2d at 234.

In addition, the claim of Petitioners Rutan and Taylor (Petition, at 12) that "the Seventh Circuit's holding on promotion and transfer conflicts sharply with the majority of the Courts of Appeal" is simply incorrect. It rests, at bottom, on a mischaracterization of both the allegations in the complaint and the Seventh Circuit's holding. We demonstrate in Section B that the issues concerning nonpunitive denials of promotion and transfer which the Seventh Circuit decided are significantly different from the claims of political retaliation in *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), and *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980). While the Seventh Circuit adopted *Delong*'s "substantial equivalent of dismissal" test as the appropriate standard by which to measure the unique allegations before it, *Delong* and other decisions involving claims of political retribution are not controlling and cannot provide the basis for Supreme Court review.

A. The Only Other Court Of Appeal To Decide The Issue Has Held That Elected Officials May Consider Political Factors In Making Subjective Hiring Decisions.

In holding that Petitioner Moore failed to state a constitutional claim, the Seventh Circuit noted that the burden imposed by a failure to obtain a particular position "is much less significant than losing a job." *Rutan*, 868 F.2d at 952; (A-18). The Seventh Circuit explained (*id.*; A-19):

> "[A]n applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment at one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income."

Against the limited burdens imposed on disappointed applicants, like Petitioner Moore, who are not hired by a state agency or department, the Seventh Circuit weighed the "great reluctance" of this Court to have federal courts "preside as a platonic guardian over state employment systems." *Id.* at 954; (A-22). *See Connick v. Myers*, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter"); *Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("Federal court is not the appropriate forum in which to review the multitude of personnel decisions made daily by public agencies").[11]

[11] The Seventh Circuit's decision on political hiring is consistent with and derives from its prior opinion in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

(Footnote continued on following page)

The Seventh Circuit's holding that elected officials may consider political factors in hiring public employees is entirely consistent with *Avery v. Jennings*, 604 F. Supp. 1356 (S.D. Ohio 1985), *aff'd*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the only other appellate decision on this question. In *Avery*, the plaintiff alleged that defendants had disqualified her from consideration for public employment because of her political beliefs. Noting that no court had ever recognized the cause of action asserted, the district court granted summary judgment on the ground that plaintiff had failed to establish any infringement of her First Amendment rights.

On appeal, the Sixth Circuit affirmed, holding that "elected officials may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." 786 F.2d at 234. The court acknowledged that the hiring system in question operated, by design, "to prefer Republicans." *Id.* at 235. During a period of nearly eight years, only 10 of the 432 persons hired by the defendants were Democrats. One of the defendants in *Avery* explained the preference in plainly

[11] *continued*

In *LaFalce*, the Seventh Circuit affirmed the district court's dismissal of a complaint in which a contractor alleged he had been improperly denied a public contract based upon political considerations. The *LaFalce* court reasoned that *Elrod*'s prohibition of political firings is based on the principle "that public employees would be discouraged from expressing their true political views if it might cost them their jobs." *Id.* at 293.

In rejecting the plaintiff's claim that unsuccessful contractors would similarly be discouraged, the court considered "both the extent of the likely interference and the consequences of trying to prevent it through an interpretation of the Constitution." *Id.* at 294. As it did in this case, the Seventh Circuit in *LaFalce* found the "extent of the likely interference" with First Amendment rights insufficient to raise constitutional concerns, and the wisdom of a constitutional ruling forbidding the use of political considerations in this context dubious at best. *Id.*

partisan terms: " '[A]ll things being equal I prefer to have a Republican working for me because I assume that he would be more interested in taking part in helping me get re-elected.' " *Id.*

In *Avery*, the court of appeals found that "[a]lthough the informal hiring practices in question here place some burden on the associational rights of prospective job applicants, that burden does not rise to the level of a constitutional deprivation." *Id.* at 236. As the court reasoned (*id.* at 237):

> "There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod*, *Branti*, *Keyishian*, *Mitchell* and *Wieman*, *supra*, and a patronage system that relies on family, friends and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes—finding good employees, maintaining and extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government."[12]

[12] In *Messer v. Curci*, 610 F. Supp. 179 (E.D. Ky. 1985), *appeal pending en banc*, No. 85-5626 (6th Cir.), the district court reached a similar result. Two seasonal workers alleged that the Kentucky Department of Parks refused to rehire them solely because of their political affiliation. The court, treating that decision as a failure to hire, found that *Elrod* and its progeny failed to support the plaintiffs' claims. 610 F. Supp. at 183.

Contrary to the implication in the questions Petitioners have presented to this Court (Petition, i), there is no allegation in this case that Respondents' employment decisions are based solely on political affiliation. *See Rutan*, 641 F. Supp. at 255; (C-11). Nor have Petitioners alleged that recommendations are made exclusively by Republican Party officials or party members, or that Petitioners' failure to obtain recommendations excluded them from consideration for the positions they sought. Petitioners claim only that Respondents are "substantially motivated by political considerations" which include an informal network of recommendations from a variety of sources. (R.A. 7, ¶ 11f.) These allegations, even if true, portray an employment system far less preclusive than the practice upheld in *Avery*. Thus, the Seventh Circuit's refusal to extend *Elrod* to encompass such a claim is entirely consistent with the other appellate authority on this issue.

In an effort to create the appearance of a conflict, Petitioner Moore cites a series of cases in which public employees were punished in retaliation for the exercise of protected speech. (Petition, at 16-19.) These cases did not involve, much less resolve, the claim of political hiring alleged in the complaint.

In *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986) (per curiam), for example, an employee of a regional mental health board alleged that his supervisor was providing prospective employers with negative recommendations because the plaintiff had cooperated with the state attorney general's investigation into allegations of fraud. The court in *Marohnic* did not discuss or even cite this Court's decision in *Elrod*, or the Sixth Circuit's prior decision in *Avery*. This confirms that *Marohnic* addressed far different issues than did *Elrod*, *Avery* or *Rutan*, and

not—as Petitioners erroneously assert (Petition, at 16)—that *Avery* is in direct conflict with *Marohnic*.

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff claimed that his employment status with the Library of Congress was adversely affected by an FBI investigation "based solely on the exercise of his associational rights resulting in concrete harms to his reputation and employment opportunities." *Id.* at 93. The uncontradicted testimony in *Clark* established that the plaintiff "suffered mental anguish and was chilled in the exercise of his first amendment rights as a result of the investigation." *Id.* at 91. Here, in contrast, Petitioner Moore has not raised any allegations that are even remotely similar.

Likewise, the statement (Petition, at 18) that *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977), is a "case remarkably like the present case" is grossly misleading. In *Cullen*, plaintiffs alleged that they were compelled to contribute at least one percent of their salaries to the county committee of the Republican Party to obtain a promotion. *Id.* at 550. In contrast to *Cullen*, it is not (and could not be) alleged in this case that Petitioners were forced to make financial contributions to the Republican Party. Petitioners' suggestion that jobs, promotions and transfers are "conditioned" on financial support to the party (Petition, at i) represents an untimely and unfounded effort to amend the complaint.[13]

[13] The other authorities upon which Petitioner Moore relies do not provide any basis for Supreme Court review. The Third Circuit has acknowledged that its suggestion in *Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3d Cir.) *cert. denied*, 434 U.S. 892 (1977), that a state may not condition hiring on political factors was "pure dicta."

(Footnote continued on following page)

In sum, there is no conflict among the courts of appeal on the issue raised by Petitioner Moore's allegations. Elected officials may take broadly defined "political considerations" into account in hiring public employees. Petitioner Moore's reliance on decisions involving dramatically different facts and legal claims confirms that there is no basis to review the Seventh Circuit's dismissal of his claim by a writ of certiorari.

B. There Is No Conflict On The Promotion And Transfer Claims Alleged.

In this case, the Seventh Circuit also was faced with the question whether Petitioners Rutan and Taylor stated a constitutional claim because they allegedly failed to obtain the promotions or transfer which they desired, based substantially, but not wholly, on broadly defined "political considerations." In answering this question, the Seventh Circuit extended *Elrod* to "protect employees from patronage practices that may, as a practical matter, impose the same burden as outright termination." *Rutan*, 868 F.2d at 952; (A-17). The Court remanded the claims of Petitioners Rutan and Taylor for a determination whether the particular employment actions complained of were "the substantial equivalent of a dismissal." *Id.* at 955; (A-25).

Petitioners Rutan and Taylor assert that this holding abandons several Seventh Circuit decisions upholding the First Amendment rights of public employees, and "con-

[13] *continued*

Mazus v. Department of Transportation, 629 F.2d 870, 873 (3d Cir. 1980). The only other case cited by Petitioner Moore, *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983), involved the right to privacy and "appellant's interest in family living arrangements, procreation and marriage." It is simply irrelevant to the issues raised in this case.

flicts sharply with the majority of the Courts of Appeal." (Petition, at 12, 13 n.5.) These contentions rest on a fundamental misapprehension of the issues raised by Petitioners Rutan's and Taylor's claims.[14]

The contention that the Seventh Circuit has overruled several of its prior decisions, *sub silentio*, underscores the attempt by Petitioners Rutan and Taylor to avoid the allegations of their complaint. In each of the decisions upon which Petitioners Rutan and Taylor rely, the plaintiffs suffered punitive employment actions in direct retaliation for protected expression. *E.g.*, *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985) (teacher given negative evaluations, removed as athletic coach and transferred as a result of speech on matter of public concern); *Egger v. Phillips*, 710 F.2d 292 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983) (former FBI agent involuntarily transferred and ultimately discharged after he alleged that other bureau personnel had engaged in wrongful conduct); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (plaintiff subjected to a pattern of harassment and ridicule in retaliation for her campaign for public office); *McGill v. Board of Education of Pekin*

[14] Petitioners also suggest that the Seventh Circuit's adoption of the "substantial equivalent of dismissal" test has the effect of relegating First Amendment rights to a position "vastly inferior" to Fourteenth Amendment rights. (Petition, at 19.) Presumably, this is so because the courts of appeal have never applied that standard to analyze the claims of public employees who have been denied positions on the basis of their race or sex. Respondents ignore the fact that this nation has not determined that "political discrimination" is subject to the same constitutional scrutiny as discrimination based on race or sex. *See LaFalce*, 712 F.2d at 294 ("To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics").

Elementary School, 602 F.2d 774 (7th Cir. 1979) (teacher involuntarily transferred in retaliation for expressing a complaint on school policy).

Here, in contrast, there is no allegation that any state employee has been transferred, harassed or in any way punished for his or her political beliefs. Petitioners Rutan and Taylor assert only that other employees received jobs, promotions or transfers which they themselves desired. (R.A. 14, 15, ¶¶ 19g, 20c, f.) This distinction was critical to the Seventh Circuit, which emphasized that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Rutan*, 868 F.2d at 954 n.4; (A-23 n.4). It was on this basis that the Seventh Circuit expressly distinguished *Bart v. Telford*, one of the cases Petitioners Rutan and Taylor now cite in an unsuccessful effort to show that the Seventh Circuit's decision in *Rutan* somehow departs from its prior decisions. *Id.*[15]

In light of this significant difference, the claims of Petitioners Rutan and Taylor are not advanced by their citation to decisions of other courts of appeal involving allegations of retaliation for the exercise of free speech. In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), for example, the plaintiffs alleged that they had been demoted in

[15] Indeed, last month, the Seventh Circuit once again harmonized its precedents in precisely this way. In *Pieczynski v. Duffy*, 88-2381 (7th Cir., May 30, 1989), the court upheld a jury verdict in favor of an employee who had been subjected to a pattern of harassment because of her political alliance with an opponent of the then-Mayor of Chicago. In doing so, the court reiterated the critical distinction underlying *Rutan*: "It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees." Slip Op. at 4; (R.A. 30).

retaliation for their support of the Mayor's political opponent. In *Robb v. City of Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984), the plaintiff was transferred from his position as manager of an outdoor amphitheater to a job as a playground supervisor in retaliation for his union activities and refusal to settle a private lawsuit. In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the sole issue before the court was whether a policeman may be demoted for "intemperately criticizing the police chief in front of another police officer while off duty." *Id.* at 834. In *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), the plaintiff contended that he had been reassigned and transferred for political reasons to a less desirable position in another region of the country. In *Lieberman v. Reisman*, 857 F.2d 896, 898 (2d Cir. 1988), the plaintiff alleged that her demands for payment relating to compensatory time and vacation time were denied solely because of her political affiliation.

Each of these cases is distinguished by a central allegation conspicuously absent from the complaint here: the plaintiffs in *Bennis*, *Robb*, *Waters*, *Delong* and *Lieberman* each suffered some concrete measure of retaliation (which disrupted their "settled expectations") as a direct result of protected expression. In contrast, this case does not involve allegations of punishment or retribution for political beliefs, but rather, the disappointment of Petitioners Rutan and Taylor that other employees received promotions or transfers which they themselves desired. Far from creating a "conflict" (Petition, at 12), the distinction drawn by the Seventh Circuit is entirely consistent with the distinction between direct and indirect burdens that was adopted in the hiring context by the Sixth Circuit in *Avery*. 786 F.2d at 235.

The only conflict that exists is with regard to an issue not presented in this case: the appropriate standard for resolving claims of political retribution short of dismissal. In *Delong*, the Fourth Circuit limited the reach of *Elrod* to punitive employment practices that "can be determined to be the substantial equivalent of dismissal." *Delong*, 621 F.2d at 624. In contrast to *Delong*, the Third Circuit has extended *Elrod* to prohibit "the imposition of any disciplinary action for the exercise of permissible free speech." *Bennis v. Gable*, 823 F.2d at 731. It may be that, in a case which appropriately presents the issue, this Court will have occasion to resolve this conflict concerning the standards for punitive transfer and demotion cases. However, the Seventh Circuit's decision to adopt the *DeLong* standard for non-punitive transfer and promotion decisions does not present such an occasion, and this is not an appropriate case for review.[16]

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[16] Because Petitioners' complaint does not allege the kind of direct punishment needed to trigger the *Keyishian* analysis, the appropriate standard under which to judge non-punitive denials of promotion and transfer presented a question of first impression. Accordingly, expressing reluctance to scrutinize Petitioners Rutan's and Taylor's pleadings "under freshly articulated standards," (*Rutan*, 868 F.2d at 955; (A-25-26)), the Seventh Circuit remanded their claims for a determination whether their failure to obtain the positions they sought was tantamount to dismissal. *Id.* at 955-56; (A-24-25). Upon the completion of discovery, the district court's application of this newly adopted standard may vitiate the need for further appellate review. Any grant of a writ of certiorari at this preliminary stage of the proceedings therefore would be improvident. *See Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967). The court of appeal's remand for a determination of the various class allegations in the complaint (*Rutan*, 868 F.2d at 957 n.6; (A-30 n.6)), similarly militates against Supreme Court review at this stage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

[Filed July 1, 1985]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

No. 85-3362

CYNTHIA RUTAN, FRANKLIN TAYLOR, DAN O'BRIEN, RICKY STANDEFER, and JAMES MOORE, individually and on behalf of Illinois Voters; CYNTHIA RUTAN, FRANKLIN TAYLOR, DAN O'BRIEN, RICKY STANDEFER, and JAMES MOORE, individually and on behalf of Illinois Taxpayers; CYNTHIA RUTAN, individually and in behalf of State of Illinois employees under the jurisdiction of the Governor desiring promotions; FRANKLIN TAYLOR, individually and in behalf of State of Illinois employees under the jurisdiction of the Governor desiring transfers; DAN O'BRIEN and RICKY STANDEFER, individually and in behalf of persons employed but laid off and not rehired by agencies under the jurisdiction of the Governor; JAMES MOORE, individually and in behalf of persons desirous of employment in agencies under the jurisdiction of Illinois, *Plaintiffs*,

v.

THE REPUBLICAN PARTY OF ILLINOIS and EACH COUNTY OF ILLINOIS by DON W. ADAMS and IRVIN SMITH, individually and as representatives of all Republican State Central Committee and County Central Committee members; JAMES THOMPSON, individually and as Governor of the State of Illinois, MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY, individually and in their official capacities; GREG BAISE, as representative of all Directors, Heads or Chief Executive Officers, since February 1, 1981, of State of Illinois Departments, Boards, and Commissions under the jurisdiction of the Governor; LYNN QUIGLEY, as representative of all liaisons since February 1, 1981, between the Governor's Office of Personnel and State of Illinois

Departments, Boards and Commissions under the jurisdiction of the Governor.

Defendants.

COMPLAINT

Plaintiffs, named above and hereinafter, individually and on behalf of all others similarly situated, by their attorneys, Leahy and Leahy, complain against Defendants, named above and hereinafter, as follows:

Introductory Statement

1. This is a class action by Plaintiffs against Defendants, who are officials and employees of the State of Illinois, and Defendants, who are persons acting in concert with Defendant officials and employees, asking this Court to declare illegal and unconstitutional Defendants maintaining and operating a political patronage system by which political and financial supporters of the Republican Party of the State of Illinois, are favored in regard to State of Illinois employment and which system discriminates against those who are not such political and financial supporters in regard to State of Illinois employment. This action also asks that the Defendants be enjoined from operating and maintaining the political patronage system.

2. This action also seeks compensatory and punitive damages for persons who have been, continue and will continue to suffer injury as a proximate result of Defendants' conduct.

3. This action also seeks compensatory and punitive damages for and in behalf of the people of the State of Illinois for the expenditure of public monies and public facilities by Defendants in operating and maintaining the political patronage system.

Jurisdiction

4. Plaintiffs bring this action pursuant to 42 *United States Code*, 1983, 1985, 1988. This Court has jurisdiction pursuant to 28 *United States Code* 1331, 1343. This Court should also entertain claims based upon State law by pendant jurisdiction.

PLAINTIFFS

Plaintiffs Who Are Voters

5a. Plaintiffs, Cynthia B. Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer and James W. Moore, are citizens and residents of the State of Illinois and are registered voters and are members of and appropriate representatives of a class of persons, namely, voters in the State of Illinois, who are entitled to cast their votes and use the election process to change and influence the direction of government and who have an interest in having a voice in government of equal effectiveness with other voters.

5b. The number and identity of such voters in the class is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

5c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiffs be designated as representatives of the class.

Plaintiffs Who Are Taxpayers

6a. Plaintiffs, Cynthia B. Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer, and James W. Moore, are citizens and residents of the State of Illinois and are registered voters and are members of and appropriate representatives of a class of persons, namely, Illinois taxpayers, and are entitled to have monies provided by the taxpayers of Illinois spent only for State purposes and not spent

on the operation and maintenance of a State political patronage system.

6b. The number and identity of such taxpayers in the class is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

6c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiffs be designated as representatives of the class.

Plaintiffs Who Are Employees Seeking Promotion

7a. Plaintiffs, Cynthia B. Rutan and Franklin Taylor, are residents, taxpayers and voters of the State of Illinois and are employees of the State of Illinois and are members of and appropriate representatives of a class of persons who are promotable employees in a department, board or commission under the jurisdiction of the Governor of Illinois but who have been and are denied promotion because they are not deemed politically acceptable or approved by Defendants.

7b. The number and identity of such persons is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

7c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individual named Plaintiffs be designated as representatives of the class.

Plaintiffs Who Are Employees Desiring Transfers

8a. Plaintiff, Franklin Taylor, is a resident, taxpayer and voter of the State of Illinois and is a member of and an appropriate representative of a class of persons who are employees of the State of Illinois in a department, board or commission under the jurisdiction of the Governor and who are desirous of transfers in their employment but have been and are denied transfers because they

are not deemed politically acceptable or approved by Defendants.

8b. The number and identity of such persons is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

8c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiff be designated as representative of the class.

Plaintiffs Who Have Been Laid Off By The State Of Illinois and Not Rehired

9a. Plaintiffs, Dan O'Brien and Ricky Standefer, are residents, taxpayers and voters of the State of Illinois and are members of and appropriate representatives of a class of persons who have been laid off from employment in departments, boards or commissions under the jurisdiction of the Governor and who have been and are prevented or impaired from being recalled to work or prevented or impaired from an equal opportunity to obtain employment with the State of Illinois because they are not deemed politically acceptable or approved by Defendants.

9b. The numbers and identity of such persons is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

9c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiffs be designated as representatives of the class.

Plaintiffs Who Are Not Employees But Who Wish To Be Employees

10a. Plaintiffs, James W. Moore, is a resident, taxpayer and voter of the State of Illinois and is a member of and

appropriate representative of a class of persons who have been and are desirous of becoming employees of the State of Illinois, but have been denied employment because they are members of a class of persons who have been and are prevented or impaired from an equal opportunity to obtain employment in departments, boards and commissions under the jurisdiction of the Governor because they are not deemed politically acceptable or approved by Defendants.

10b. The numbers and identity of such persons is so large and varied that it is not practical for each to pursue his or her claim in separate actions.

10c. The questions of law and the relevant facts upon which all members of the class are entitled to relief are so similar that it is appropriate that the individually named Plaintiff be designated as representative of the class.

The Patronage System

11. Since on or before February 1, 1981, Defendants, have maintained and operated a political patronage system in the State of Illinois, which operates under the following circumstances and the following manner:

11a. More than fifty departments, boards and commissions under the jurisdiction of the Governor of Illinois employ approximately 60,000 persons.

11b. During each year more than 5,000 jobs become available as a result of resignations, retirement, death, expansion, changes in classifications, reorganizations and other changes in the departments, boards and commissions under the jurisdiction of the Governor.

11c. On November 12, 1980, Defendant Thompson issued an executive order which requires his personal approval or that of a designee before any individual may be hired or promoted by any department, board or commission under the jurisdiction of the Governor. Attached hereto and incorporated herein as Exhibit A is the Executive Order.

11d. Defendant Thompson has assigned the power to approve or disapprove such employment transactions to employees in his office who operate under what is styled the "Governor's Office of Personnel."

11e. The "Governor's Office of Personnel" controls all hiring, transfers, promotions and other significant aspects of employment by approving or disapproving such transactions on an individual basis using the Executive Order as its authority.

11f. In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the "Governor's Office of Personnel" are substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson.

11g. In giving or refusing approval of a particular individual for a particular employment position the "Governor's Office of Personnel" makes use of the individual's voting records and voting records and support of the individual's relatives and the individual's financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level.

11h. The Republican Party screens prospective employees by determining at the local or county level the voting history of the person and that of relatives of such persons, the past financial support of the Republican Party and its candidates, the future potential of such financial support, the potential of future "volunteer" work by the applicant in behalf of the Republican Party and its candidates. Attached hereto and incorporated herein as Ex-

hibit B is the application form for promotion in State government employment used by the Republican Party in Sangamon County.

11i. Within State departments, boards and commissions under the Governor's jurisdiction selected employees serve as liaisons between the "Governor's Office of Personnel" and the departments, boards or commissions on employment matters. These persons bear titles such as "Administrative Assistant," "Assistant to the Director" or similar labels. The liaison's function is to become aware of, keep track of and inform the "Governor's Office of Personnel" as to openings, promotions and similar matters so that the "Governor's Office of Personnel" can give those who are politically favored employment and promotions.

11j. The Directors and Heads of State departments, boards and commissions under the Governor's jurisdiction share legal authority with the Department of Central Management Services in approving or disapproving matters of personnel transactions under the Personnel Code of the State of Illinois, *Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101 *et seq.* These Directors or Heads have and are cooperating in the patronage system by active participation or by giving an employee such as the liaison power to make employment decisions.

11k. The purpose and effect of the political patronage system operated under the "Governor's Office of Personnel" is to limit State employment and the benefits of State employment to those who are politically favored and to limit and prevent those who are not favored from having such employment benefits and thereby provide the Governor, the Republican Party and Republican candidates for political office with political campaign contributors and to discourage opposition to the Governor and the Republican Party in elections. This system thereby creates a significant political effort in favor of the "ins" i.e. defendant James Thompson and his political allies and against the "outs" i.e. those who may wish to challenge in elections.

DEFENDANTS

The Republican Party In Illinois

12a. The Republican Party in Illinois is composed of several parts, the two principal parts being the Republican State Central Committee and County Central Committees.

12b. In 101 of the 102 counties in Illinois, party officials are elected in party primaries at the precinct level. In each of the 101 counties, the precinct committeemen elect one of their members as chairman of the Republican County Central Committee.

12c. In Cook County committeemen are elected by Republican primary voters for each Ward (Chicago) and each Township (Suburban Cook County). These committeemen elect a county chairman. These committeemen each have the power to appoint precinct captains in their respective Wards or Townships.

12d. The Republican State Central Committee is composed of party representatives from the several congressional districts in Illinois. They in turn elect a state chairman.

12e. The most recent publication of the State Board of Elections of the State of Illinois (1984-1985) lists the names of approximately 5,400 Republican precinct committeemen (101 counties), 80 Township and 50 Ward Committeemen (Cook County) and 54 members of the State Central Committee.

12f. The Republican Party of the State of Illinois and the County Republican Party organizations exist as private organizations to promote the goals of the Republican Party and its candidates.

Defendants Who Are Officials of the State Republican and County Republican Central Committees

13a. Defendant, Don Adams, is an adult resident of Sangamon County, Illinois, and is chairman of the Republican State Central Committee.

13b. Defendant, Irvin Smith, is an adult resident of Sangamon County, Illinois, and is Chairman of the Sangamon County Republican Central Committee.

13c. Defendants, Adams and Smith, are members of and appropriate representatives of a class of Defendants, namely all Republican State Central Committee and County Central Committee officials and members including all present precinct captains and precinct committeemen and all persons who held such positions at any time since February 1, 1981.

13d. The members of this class of Defendants screens and limits and prevents persons, other than those politically acceptable and approved, from becoming employees in departments, boards or commissions under the jurisdiction of the Governor or, once employed, from receiving other benefits of employment.

13e. The number and identity of the officials of the Republican Party is so large and varied that it is not practical that they be brought before the court except by an appropriate representative.

13f. The questions of law and the relevant facts which apply to the members of the class are so similar that it is appropriate the individually named Defendants be designated as representatives of the class.

Defendant James Thompson

14a. Defendant James Thompson is an adult citizen and resident of the State of Illinois with residences in Springfield, Illinois and Chicago, Illinois, and in 1976, 1978 and 1982 was the Republican Party candidate for Governor of the State of Illinois and continuously since January of 1977 has served as Governor of the State of Illinois.

14b. Defendant Thompson has established, maintained and permitted the operation of the employment patronage system outlined in Paragraph 11.

Defendants Who Manage And Supervise Employment Patronage System

15a. Defendant, Mark Frech, is an adult resident of Morgan County, State of Illinois, and has been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, since February 1, 1981, as an Assistant Director or Director of the "Governor's Office of Personnel."

15b. Defendant, Greg Baise, is an adult resident of Sangamon County, State of Illinois, and was employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois since before February 1, 1981, until the Spring of 1983 as the Director of the "Governor's Office of Personnel." Defendant has been and continues to be the chief executive officer of the Department of Transportation of the State of Illinois since leaving his position in the Governor's Office.

15c. Defendant William Fleischli, is an adult resident of Sangamon County, State of Illinois and since on or before January 1, 1983, has been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, as an assistant Director of the "Governor's Office of Personnel."

15d. Defendant, Randy Hawkins, is an adult resident of Sangamon County, State of Illinois, and since on or before January 1, 1983, has been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, as an Assistant Director of the "Governor's Office of Personnel."

15e. Defendant, Kevin Wright, is an adult resident of Sangamon County, State of Illinois, and since on or before January 1, 1983, has been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, as an Assistant Director of the "Governor's Office of Personnel."

15f. Defendant, James Reilly, is an adult resident of Morgan County, State of Illinois, and has since before

January 1, 1984, been employed in the Office of the Governor in Room 202 of the State Capitol in Springfield, Illinois, with supervisory power over the governor's staff and has been and is the immediate supervisor of Defendant Frech; in turn, Defendant Reilly reports directly to and is immediately supervised by Defendant Thompson.

15g. The Defendants named in paragraphs 15a through 15f have as a major duty the supervision and administration of the Governor's patronage system as described in paragraphs 11a through 11f; these Defendants have and do spend a substantial part of their time in pursuit of this venture and their salaries and the expenses of running the Governor's Office of Personnel is paid for by tax dollars. Defendants Baise and Wright did serve in the Governor's Office of Personnel, but now have other state employment positions under the jurisdiction of the Governor.

Defendants Who Serve As Employee Liaisons

16a. Defendant, Lynn Quigley, is an adult resident of Sangamon County, State of Illinois, and is a member of and appropriate representative of a class of persons, namely, employees of the State of Illinois and those who have held such positions since February 1, 1981, who are assigned to and do facilitate the placing of politically approved persons in the various departments, boards and commissions under the jurisdiction of the Governor and serve as liaisons with the Governor's Office of Personnel.

16b. The number and identity of such "liaisons" is so great and varied that it is impractical that they be brought before the court except by an appropriate representative of the class.

16c. The questions of law and the relevant facts which apply to the members of the class are so similar that it is appropriate Defendant Quigley be designated representative of the class of Defendants who serve or have served as liaisons with the Governor's Office of Personnel.

Defendants Who Are Directors and Heads of State Departments, Boards and Commissions

17a. Defendant, Gregory Baise, is an adult resident of Sangamon County, State of Illinois, and is the Secretary of the Illinois Department of Transportation.

17b. Defendant Baise is the chief executive officer of Illinois Department of Transportation and is a member of and an appropriate representative of a class of individuals, namely Directors, Heads or Chief Executive Officers, and all who held such a position since February 1, 1981, of departments, boards and commissions under the jurisdiction of the Governor of the State of Illinois.

17c. Defendant Baise and the other members of the class have supported, approved or knowingly permitted the operation of the political patronage system in the departments, boards or commissions under their control.

17d. The number and identity of such directors or chief executive officers is so large and varied that it is impractical that each be brought before the court except by an appropriate representative of the class.

17e. The questions of law and the relevant facts which apply to the members of the class are so similar that it is appropriate the individually named Defendant be designated as representative of the class.

Status of Defendants

18. Each Defendant is being sued in his individual and official capacity.

Circumstances of Individual Plaintiffs

Plaintiff Cynthia B. Rutan

19a. In particular Plaintiff Rutan began to work for the Department of Rehabilitative Services of the State of Illinois on May 16, 1974, and has worked for said department continuously since that date.

19b. Since the Fall of 1981 Plaintiff Rutan has repeatedly applied for supervisory vacancies in the Bureau of Adjudicative Services in the Department of Rehabilitative Services, which vacancies would have been a promotion for her.

19c. Each of these positions falls under the Personnel Code of the State of Illinois, *Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101.

19d. Each one of these positions was and continues to be funded with federal tax dollars under the Social Security Entitlement Program; as such, these positions should not be filled on a patronage basis.

19e. In the Fall of 1983 Plaintiff Rutan obtained a copy of the form attached hereto and incorporated herein as Exhibit "B" from the Sangamon County Republican Central Committee, which form is used by the Republican Party and the Governor's Office of Personnel in promoting employees in departments, boards and commissions under the jurisdiction of the Governor.

19f. Plaintiff has not been active in the Republican Party nor supported Republican candidates for office.

19g. Each one of the supervisory positions for which Plaintiff Rutan applied was filled by someone less qualified but someone who was favored on a political basis by the Governor's Office of Personnel.

Plaintiff Franklin Taylor

20a. Plaintiff Taylor began to work for the Illinois Department of Transportation (I.D.O.T.) in 1969 as an equipment operator and has worked continuously for the Department since that date.

20b. In July of 1983 Plaintiff Taylor applied for a lead worker's position which would have been a promotion and which falls under the Personnel Code of the State of Illinois, *Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101.

20c. Medford Phillips, another I.D.O.T. employee, who was less qualified and had less seniority than Plaintiff Taylor got the lead worker position; Medford Phillips had received the support and approval of the Fulton County Republican Party for the position.

20d. Since 1969 Plaintiff Taylor has been assigned to Fulton County.

20e. In the Summer of 1983 Plaintiff Taylor began to ask to be transferred to Schuyler County, the county in which he resides.

20f. Plaintiff Taylor has been advised that his transfer cannot be granted because both the Fulton County and Schuyler County Republican County Chairmen oppose the transfer.

20g. Plaintiff Taylor has not been active in the Republican Party nor has he actively supported Republican candidates.

Plaintiff Ricky Standefer

21a. On or about May 12, 1984, Plaintiff Standefer was hired in a temporary position at the State Garage in Springfield, Illinois.

21b. In November of 1984 Plaintiff Standefer was laid off along with five other employees.

21c. All five other employees were offered other jobs but Plaintiff Standefer was not offered any other job in state government.

21d. The other laid-off employees who received job offers had the support of the Republican Party.

21e. Plaintiff Standefer had voted in the Democratic primary.

Plaintiff Dan O'Brien

22a. Plaintiff O'Brien began to work for the State of Illinois as a support service worker (dishwasher) at the

Lincoln Development Center of the Department of Mental Health and Developmental Disabilities on April 1, 1971.

22b. Plaintiff O'Brien continued to work at the Center until April 5, 1983, when he was laid off; at that time he was a Dietary Manager I.

22c. Under the rules of the Department of Central Management Services a laid-off employee can be recalled within two (2) years of lay-off; recall within that time period means no loss of seniority and continuation of other employment benefits.

22d. In December of 1984 Chuck Cicci, business administrator for the Lincoln Development Center told Plaintiff he was going to be recalled to work and that Cicci was waiting for the exception to the freeze executive order to be approved by the Governor's Office in Springfield so Plaintiff could be recalled.

22e. In mid or late February of 1985 Superintendent Johnson, head of the Lincoln Development Center, told Plaintiff the exception to the freeze executive order had been denied by the Governor's Office in Springfield.

22f. Plaintiff has voted only once in a primary election, that once was in a Democratic primary.

22g. After Plaintiff O'Brien had been laid off for several months, Plaintiff O'Brien attempted to get employment with the Department of Corrections; ultimately Plaintiff was employed with the Department, with zero beginning seniority and at a lesser salary than he had earned at Lincoln Development Center, but he obtained such employment only after he had obtained the support of Sapp, the Chairman of the Republican Party of Logan County.

Plaintiff James Moore

23a. Plaintiff Moore was honorably discharged from the United States Army in 1958 and qualifies for Veterans Status in seeking employment with the State of Illinois.

23b. Since 1978 Plaintiff Moore has sought employment with the State of Illinois particularly with the Department of Correction of the State of Illinois.

23c. In August of 1980 Plaintiff Moore received a letter from their Representative Bob Winchester (Republican) a copy of which is attached hereto as Exhibit "C."

23d. Plaintiff Moore then talked to Clyde Stallions, then the Republican County Chairman of Pope County, who repeatedly told Plaintiff that all he needed to get the job was two signatures, his and then Representative Bob Winchester's.

23e. While Plaintiff Moore has been attempting to get work with the State, Victor English, the son of the current Chairman of the Pope County Republican Central Committee, Brian Burk, the son-in-law of the Vice-Chairman and precinct committeewoman of the Pope County Republican Central Committee, and Dorris Thomas, Plaintiff Moore's Republican precinct committeeman, have all been hired by State government in positions for which Plaintiff Moore was qualified.

Claims As To Individuals And The Classes They Represent

24. The patronage employment system described in this complaint is unlawful and violates the United States and Illinois Constitutions and in one or more of the following respects:

24a. It violates the right of individuals to be free from discrimination in regard to matters of employment and to be free from penalties for the exercise of free speech, the right of association or for refraining from speech or political associations, which rights are protected by the First and Fourteenth Amendments to the United States Constitution.

24b. It violates the right of individuals to be free from discrimination in regard to matters of State employment because they do not belong to a favored group of political

and financial supporters of the Republican Party or are not friends of the Governor or are not otherwise politically acceptable to the Governor or his designee which right is protected by the equal protection clause of the Fourteenth Amendment of the United States Constitution.

24c. It violates the rights of citizens to have their property rights protected by the Due Process clause of the Fourteenth Amendment to the United States Constitution in that the system is totally outside procedures and practices of the *Personnel Code* of the State of Illinois (*Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101 *et seq.*) which provides a comprehensive procedure for the recruiting, examining, qualifying, hiring and retention of employees of departments, boards and commissions under the jurisdiction of the Governor, which statute creates certain property interests; the patronage system ignores and disregards rights provided by this statute.

24d. It violates the right of individuals to equal protection and the right to equal access and effectiveness of elections guaranteed by the Fourteenth Amendment to the United States Constitution in that it allows the Governor and the Republican Party of Illinois to coerce and enlist and reward political support and make use of such support throughout Illinois while at the same time the Democratic Party in Cook County, State of Illinois (its traditional stronghold) is restrained by orders of the United States District Court for the Northern District of Illinois in *Shakman v. Democratic Organization of Cook County*, No. 69-C-2145, from engaging in the employment practices outlined in this complaint in the offices held by Democrats.

24e. It violates the right of citizens to the form of government guaranteed by Article IV, Section 4 of the United States Constitution.

24f. It violates the Due Process clause and Equal Protection clause of Article I, Section 2 of the Constitution of the State of Illinois in that it:

1) Applies tax money for other than public purposes;

2) It discriminates against persons who are not politically favored.

24g. It violates the right of individuals to speak, write and publish freely without fear of becoming not favored in matters of public employment which right is protected by Article I, Section 4 of the Constitution of the State of Illinois.

24h. It violates the right of individuals to assemble, consult and make known their opinions without fear of becoming not favored in matters of public employment which right is protected by Article I, Section 5 of the Constitution of Illinois.

24i. It violates Article III, Section 3 of the Illinois Constitution by interfering with the right of the people to free and equal elections.

25. Each Defendant and the members of the classes of Defendants have knowledge of the system and have acted in concert with other Defendants to implement the goals and purposes of the employment patronage system as described in this complaint.

26. The various Defendants who are employees and officials of the State of Illinois have and continue to act under color of law in the implementation of the employment patronage system as described in this complaint.

27. The Defendants have kept secret and not disclosed to the Plaintiffs or the general public that Defendants have and are discriminating against Plaintiffs and the classes of persons of which Plaintiffs are members.

28. Defendants' conduct was and is in violation of established law which had been announced prior to 1980 by the United Sates District Court for the Northern District of Illinois in *Shakman v. Democratic Organization of Cook County*, No. 69-C-2145.

29. As a direct and proximate result of Defendants' conduct Plaintiffs, Cynthia B. Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer, and James W. Moore, and the voters whom they represent have had the value of their votes diminished and have been denied a voice in government of equal effectiveness with other voters.

30. As a direct and proximate result of Defendants' conduct Plaintiffs, Cynthia B. Rutan, Franklin Taylor, Dan O'Brien, Ricky Standefer, and James W. Moore, and the taxpayers whom they represent have been deprived of the benefit of more than $2,000,000 in tax monies of the State of Illinois which have been expended for the support of the patronage system and not for a governmental purpose.

31. As a direct and proximate result of Defendants' conduct Plaintiffs, Cynthia B. Rutan and Franklin Taylor, and persons who are promotable employees have been denied promotion and the benefits of promotion including salary increases.

32. As a direct and proximate result of Defendants' conduct Plaintiff, Franklin Taylor, and employees of the State of Illinois desiring transfers have been denied transfers.

33. As a direct and proximate result of Defendants' conduct Plaintiffs, Ricky Standefer and Dan O'Brien, and other employees who have been laid off have been denied employment and recall, and the benefits of employment.

34. As a direct and proximate result of Defendants' conduct Plaintiffs, James W. Moore and other persons desirous of State employment have been denied such employment and such persons have been deprived of more than $500,000,000.00 in income which has been channeled to persons who have been deemed politically approved by Defendants through use of the patronage system.

35. Defendants' conduct was and continues to be in knowing violation of Plaintiffs' rights or in reckless dis-

regard of Plaintiffs' rights as guaranteed by the United States Constitution, entitling Plaintiffs to punitive damages against the Defendants individually.

WHEREFORE, Plaintiffs pray:

1. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of the First Amendment to the United States Constitution.

2. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

4. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of Article IV, Section 4 of the Constitution of the United States.

5. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of Article I, Sections 2, 4 and 5 of the Illinois Constitution.

6. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of Article III, Section 3 of the Illinois Constitution.

7. That the Court adjudge, decree and declare the political patronage system described in this complaint to be in violation of the Illinois Personnel Code, *Ill. Rev. Stat.*, Ch. 127, Sec. 63 b 101 *et seq.*

8. That the Court enjoin each Defendant and members of the classes of defendants from maintaining and operating the patronage system described in this claim.

9. That the Court award damages in favor of Plaintiffs and the members of the classes represented in the amount of $500,000,000 (Five Hundred Million Dollars) in compensatory damages against Defendants and provide a system to award a specific amount of such damages to specific individuals in plaintiff classes.

10. That the Court award punitive or exemplary damages in the amount of $500,000,000 (Five Hundred Million Dollars) to Plaintiffs and against Defendants.

11. That the Court award damages against Defendants in the amount of $2,000,000.00 to be paid into the State Treasury as compensation for expenditure of public funds in the operation of the patronage system.

12. That the Court grant such other relief as may be deemed appropriate including but not limited to the appointment of a Receiver to take control of and operate the hiring and promotion system of the State of Illinois for departments, boards and commissions under the jurisdiction of the Governor in order to prevent further constitutional violations and to rectify the future effect of violations that have already occurred.

13. That issues subject to trial by jury be so tried.

14. That the Court award Plaintiffs attorney's fees, costs and expenses of litigation.

/s/ MARY LEE LEAHY
LEAHY AND LEAHY
919 S. Pasfield
Springfield, IL 62704
(217) 522-4411

EXHIBIT A

(Letterhead Of)

STATE OF [*Seal*] ILLINOIS
EXECUTIVE DEPARTMENT
SPRINGFIELD, ILLINOIS

EXECUTIVE ORDER Number 5 - (1980)

HIRING FREEZE

Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. *All hiring is frozen.* There will be *no* exceptions to this order without my express permission after submission of appropriate requests to my office.

EXHIBIT B

SANGAMON COUNTY REPUBLICAN CENTRAL COMMITTEE
200 SOUTH SECOND STREET, SPRINGFIELD, IL 62701 No. [redacted]

PRINT OR TYPE

NAME _____ DATE _____

ADDRESS _____ PRECINCT _____ TOWNSHIP _____

TELEPHONE _____

VOTING ADDRESS IF DIFFERENT _____ PRECINCT _____

AGE _____ DATE OF BIRTH _____ SOCIAL SECURITY # _____

PRESENT POSITION _____ DEP'T _____

DESIRED POSITION _____ DEP'T _____

HOW LONG IN PRESENT POSITION _____

REASON FOR CHANGE _____ ARE YOU QUALIFIED? _____

GIVE NAME OF TEST TAKEN _____ GRADE _____ DATE _____

FOR WHICH PARTY DID YOU VOTE IN PRIMARY ELECTIONS?

1984 _____ 1982 _____ 1980 _____ 1978 _____

(NOTE: If under age, question applies to parents.)
Enter name here: _____

DO YOU HOLD A MEMBERSHIP IN THE LINCOLN CLUB OF SANGAMON COUNTY? _____

WOULD YOU BE WILLING TO BECOME AN ACTIVE SANGAMON COUNTY REPUBLICAN FOUNDATION MEMBER? _____ (The foundation is a voluntary, financial assistance organization)

WOULD YOU BE WILLING TO CANVASS AND WORK YOUR PRECINCT OR NEIGHBORHOOD FOR CANDIDATES THE CENTRAL COMMITTEE RECOMMENDS AS QUALIFIED FOR LOCAL, STATE, AND NATIONAL OFFICES? _____

I AFFIRM THAT THE INFORMATION GIVEN ON THIS APPLICATION HAS BEEN ANSWERED HONESTLY TO THE BEST OF MY ABILITY.

_____
Signature of Applicant

I RECOMMEND THE ABOVE APPLICANT BECAUSE _____

_____

_____
Signature of Precinct Committeeman

EXHIBIT C

(Letterhead Of)

GENERAL ASSEMBLY
STATE OF ILLINOIS
ROBERT C. WINCHESTER
STATE REPRESENTATIVE - 59th DISTRICT

August 15, 1980

James W. Moore, Sr.
Route 3, Box 278
Golconda, Illinois 62938

Dear Mr. Moore:

In response to your July letter requesting employment with the State of Illinois, please be advised that there are over 1,100 applications of file at the Vienna Correctional Center. Of those, 450 have been strongly recommended by the precinct committeemen within the Republican organization. This represents requests for employment from the 12 counties in the 59th legislative district.

At present we have 15 jobs to fill at Vienna. Pope County is assigned one of these positions to fill. There are a considerable amount of people on the Pope County waiting list. I do not know where your name is on that list. It is just simply a case of not having enough jobs for all the people requesting employment.

I might add though, that since I have been a State Representative, Pope County has received more jobs at the Vienna Correctional Center than they ever have before. In the past 90% of all jobs were filled with people from Johnson County, with the other 10% coming from the surrounding counties. We have reversed that with 10% coming from Johnson County and 90% coming from the surrounding counties.

I would suggest that you make contact with your precinct committeeman and your Republican County Chairman. You will have to receive the endorsement of the Republican Party in Pope County before I can refer your name to the Governor's office.

Sincerely,

/s/ BOB
Robert C. "Bob" Winchester
State Representative

RCW/jam

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2381
MARY PIECZYNSKI,

Plaintiff-Apppellee,

v.

KATHERINE DUFFY and ROBERTO MALDONADO,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 5644—**Harry D. Leinenweber,** *Judge.*

ARGUED APRIL 19, 1989—DECIDED MAY 30, 1989

Before CUMMINGS, POSNER, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* Mary Pieczynski, an employee of the City of Chicago, brought this civil rights suit (42 U.S.C. § 1983) against the City and three of her supervisors, charging political harassment in violation of the First Amendment, which has of course been held applicable to the states and their subdivisions. The jury exonerated the City and one of the supervisors, but found the other two supervisors, Duffy and Maldonado, liable, and awarded Pieczynski $95,000 in compensatory damages and $7,500 in punitive damages. Duffy and Maldonado appeal, represented by the City. The City argues qualified immunity and also complains about the exclusion of certain

evidence and about the size of the damages award, but its major argument is that there is insufficient evidence of harassment to sustain the verdict. In making this argument the City, in an ill-mannered brief bristling with ad hominem criticisms of its adversary, presents the facts as it would have liked the jury to find them rather than the facts that a rational jury might have found against the appellants.

Claims of politically motivated personnel action in public employment abound in this circuit—*Elrod v. Burns*, 427 U.S. 347 (1976), which opened this particular floodgate, originated here—and it may be useful at the outset to try to harmonize the precedents in order to provide guidance to the bench and bar of this circuit. Our emphasis is therefore on Supreme Court and Seventh Circuit cases, but we shall refer to a few cases from the other circuits too.

1. The discharge of a public employee because of his political beliefs violates the First Amendment, *Elrod v. Burns, supra*, unless the employee's job is a policymaking position or a position of confidence, such that his employer should have a free hand in deciding whether to retain the employee, *Branti v. Finkel*, 445 U.S. 507 (1980); *Bicanic v. McDermott*, 867 F.2d 391 (7th Cir. 1989); *Kurowski v. Krajewski*, 848 F.2d 767, 769-70 (7th Cir. 1988); *Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir. 1985).

2. A discharge is not *because* of the employee's political beliefs if the employee would have been discharged regardless of those beliefs, even if the reason he would have been discharged anyway, while nonpolitical, is thoroughly disreputable, such as nepotism. *Byron v. Clay*, 867 F.2d 1049, 1051 (7th Cir. 1989) (dictum); *Lindahl v. Bartolomei*, 618 F. Supp. 981, 990-91 (N.D. Ind. 1985). The First Amendment is not a civil service statute.

3. A discharge does not violate the First Amendment even though the only reason for the discharge is political, if reinstatement or the other relief requested would vio-

late strong public policy, for example as embodied in state criminal prohibitions of "ghost employment" (which means being on the public payroll without doing any work). *Byron v. Clay, supra*, 867 F.2d at 1051-52. To that extent—but to that extent only—there is a defense of "unclean hands" (if equitable relief is sought) or "*in pari delicto*" (if legal relief is sought). But the mere fact that valid grounds exist for discharging the worker will not excuse the employer if, had it not been for the worker's political beliefs, he would not have been discharged. See *id.* at 1051; *Shondel v. McDermott*, 775 F.2d 859, 869 (7th Cir. 1985).

4. Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs. See, e.g., *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982); *Rode v. Dellarciprete*, 845 F.2d 1195, 1205 (3d Cir. 1988). The harassment need not be so severe as to amount to constructive discharge—that is, it need not force the employee to quit, by making work unbearable for him. *Lieberman v. Reisman*, 857 F.2d 896, 900 (2d Cir. 1988); contra, *DeLong v. United States*, 621 F.2d 618 (4th Cir. 1980).

5. A statute or ordinance, general in terms, governing public employment does not violate the First Amendment even if enacted in retaliation against a group of public employees for their political views or activities. *Fraternal Order of Police v. City of Hobart*, 864 F.2d 551 (7th Cir. 1988); cf. *Rateree v. Rockett*, 852 F.2d 946, 950-51 (7th Cir. 1988).

6. Political criteria are permissible in hiring, although not in firing. *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954-55 (7th Cir. 1989) (en banc); cf. *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) (permitting the use of political criteria in awarding public contracts). The principle has been extended to transfers following the abolition of particular jobs—as a practical matter such transfers are hires. See *McDonald v. Krajewski*, No. 88-3190, slip op. at 3 (7th Cir. May 5, 1989).

7. Political criteria are also permissible in promotions and in transfers between existing jobs unless the practical consequence for an employee adversely affected by the application of the criteria is to discharge him. *Rutan v. Republican Party of Illinois, supra*, 868 F.2d at 955-56; contra, *Bennis v. Gable*, 823 F.2d 723, 731-32 (3d Cir. 1987). This use of politics is thus treated differently from harassment targeted on particular employees (*Bart v. Telford, supra*). "[A]cts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off." *Rutan v. Republican Party of Illinois, supra*, 868 F.2d at 954 n. 4. It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable but not intended consequence of favoritism for other employees.

Do the decisions establishing as the law of this circuit the propositions we have set forth compose a pattern, or a crazy quilt? We discern a pattern, albeit of the rough-and-ready sort characteristic of common law adjudication. The courts, interpreting a vague constitutional command in circumstances remote from those envisaged by the framers, feel the tug of opposing policies. See, e.g., *LaFalce v. Houston, supra*; *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc). On the one hand, retaliating against public employees for their political beliefs may strip a significant (although not, characteristically, an outspoken) part of the community, namely rank-and-file civil servants, of freedom of political expression. The broader public will be losers as well, to the extent that public employees have valuable insights and information about the operation of government to convey. (Yet the constitutionality of the Hatch Act, which forbids federal employees to take an active role in political campaigns, has been upheld against a First Amendment challenge. See *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).) On the other hand, the First Amendment can hardly be thought to command a thorough purging of politics from politics and the reconstruction of all of American

government on the city-manager model. Such a program would be as quixotic as it would be undemocratic, and in preventing government officials from rewarding loyal supporters with government jobs or government contracts could diminish rather than intensify the energy of political debate.

The balance that has been struck confines constitutional protection to public employees who do not occupy a position of confidence or of responsibility for making policy, and who either lose their jobs or are made targets of on-the-job harassment in retaliation for failing to support the incumbent, and who neither are "ghost workers" nor would have been fired or disciplined on any (other) nonpolitical ground, so that their only offense is their politics. This fairly narrow class of protected employees presents the most sympathetic case for judicial intervention, because the affront to First Amendment values is patent, while the interest in loyal and effective government is minimally impaired by judicial intervention in such a case. The balance is different when a newly elected official seeks to fill jobs with the people who made his victory possible or wants confidential employees whom he trusts and policymaking employees who share his policy views.

Yet even the case we have described as the strongest for judicial intervention is problematic, for reasons related to judicial capacity to find facts and well illustrated by the present case. "Harassment" that is divorced (as here) from any racial or sexual overtones is exceedingly difficult to distinguish in practice from the normal friction between supervisory and subordinate employees; as a result, the existence of a constitutional tort of political harassment places public employers at the mercy of the vagaries of juries. Employees may try to buy themselves immunity from discipline by staking out a political position opposed to that of their employer, then ascribing to political persecution every act of discipline, every adverse change in working conditions, every failure of consideration by a superior, and finally bringing a suit for compensatory damages based on vague emotional malaise, and seeking punitive damages to boot.

It would be nice to be able to filter out the phony cases but we have been unable to think of a good filter beyond what is already provided by pretrial discovery and summary judgment and Rule 11 and directed verdict and remittitur and the other checks on groundless cases and runaway juries. In the end much will depend on the good sense of juries, and our faith in the jury is not so great that we can regard this prospect with equanimity.

The present case is exceedingly thin and the plaintiff may owe her victory largely to the heavy-handed tactics of the City's lawyer, who in closing argument repeatedly called Mrs. Pieczynski a liar and challenged the jury to award her a million dollars if it disagreed. "He [the plaintiff's counsel] is asking for $100,000. You might as well give her a million dollars. If you believe that, give her all the money in the world." Poor representation of state and local government is an old story.

Mary Pieczynski had been hired in 1980 as a secretary to Edward Scanlon, Director of Management Services in the Mayor's Office of Employment and Training, at a salary of $10,600. Both she and Scanlon were members of the 10th Ward Democratic Organization, headed at the time by Alderman Edward Vrdolyak; she owed her job with Scanlon to this political connection. In 1983 Pieczynski was promoted to an executive position in the office, at a salary of $18,000 which by the time of trial had risen to $25,000. Shortly afterward, Harold Washington—a bitter enemy of Vrdolyak—was elected Mayor, and eventually Scanlon left and was replaced on an acting basis by Pieczynski. In November 1984 defendant Maldonado was appointed the permanent successor to Scanlon. Maldonado reported to defendant Duffy, the recently appointed Deputy Director of the Mayor's Office of Employment and Training. Both Duffy and Maldonado were supporters of Mayor Washington, and there was much bad blood at the time between Washington and Vrdolyak, who were fighting for control of the City Council. There was evidence from which a reasonable jury could infer that both Duffy and Maldonado knew of the plaintiff's connection with

Vrdolyak, for she and her husband were heavily involved in public activities on Vrdolyak's behalf.

Two months after Duffy's appointment (and one month after Maldonado's), Duffy wrote a memo to the City's Department of Personnel requesting that disciplinary action be taken against Mrs. Pieczynski for a number of alleged misdeeds, such as using an unauthorized parking place. The jury was entitled to find that these accusations were baseless; and in fact no disciplinary action was taken against her. Then Maldonado took up the cudgels, accusing Pieczynski of taking a bribe by accepting a gift of a cordless telephone from a city contractor, confining her duties to monotonous paper work, terminating her supervisory authority over other employees, removing her long-distance line (so that she had to borrow another employee's phone when she had a long-distance call to make, as her work required her often to do), calling her a liar, denying requests for vacation time and administrative leave, abusing her for leaving work early one day to pick up an ill child, failing to introduce her to new employees, turning down her repeated requests to change her lunch hour, and failing to invite her to his birthday party. To all these accusations (the last of which, at least, is absurd, for the party took place after this suit was filed, and the First Amendment does not require the defendant in a lawsuit to invite the plaintiff to his birthday party) the defendants presented reasoned defenses, emphasizing for example that after Maldonado replaced Pieczynski *of course* her supervisory duties were curtailed. And the plaintiff's counsel soared into outer space in closing argument, arguing that Maldonado, a psychology major in college, had learned in Psychology 101 "how to drive mice nuts" and had used his learning to torment Mrs. Pieczynski.

But we cannot quite say that no rational jury would have believed Mrs. Pieczynski's version of the facts. For example, while the defendants presented evidence that her long-distance phone line was one of five or six removed as an economy measure, she rebutted with evidence that when later 40 new long-distance lines were installed she

wasn't given one even though she needed it for her work. Taking the facts as favorably to her case as reason permits, we cannot say that she was not the victim of a calculated campaign to humiliate her, drive her to resign, even break her health, in punishment for her association with the hated Vrdolyak. And such a campaign violates the First Amendment.

The other issues can be dealt with very briefly. *Bart v. Telford, supra*, scotches the defendants' defense of qualified immunity. Decided before the election of Mayor Washington, *Bart* holds that a campaign of petty harassments directed against a public employee in retaliation for his political beliefs or affiliations violates the First Amendment. The facts were different from those of this case—one of the alleged acts of retaliation directed against Miss Bart was making fun of her for bringing a birthday cake to an office party, and there is a birthday party but no cake in this case. But the principle that a campaign of petty harassments can violate the First Amendment (unless *de minimis*) was clearly stated in *Bart*, and should have placed these defendants on notice that false accusations and petty humiliations, if orchestrated into a campaign of political retaliation, are actionable. See *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987); *Kurowski v. Krajewski, supra*, 848 F.2d at 773.

The judge excluded evidence that the defendants disciplined and otherwise took adverse action against persons under their supervision who were supporters of Mayor Washington and promoted or otherwise treated favorably several opponents of Washington. Of course such evidence must be let in if the plaintiff has been allowed to present evidence to show a pattern of discrimination. Cf. *Miller v. Poretsky*, 595 F.2d 780, 784-85 (D.C. Cir. 1978). But if the plaintiff presents no such evidence the trial judge has a broad discretion to exclude the defendant's proffer, a discretion that was not abused here. Just as it is not a defense to racial discrimination in employment that the employer mistreated some of his white employees and didn't mistreat all of his black employees, so it is not

a defense to a claim of political retaliation in employment that not *all* personnel decisions by the employer were politically motivated. It might be quite feasible to intimidate an entire office by picking on one employee, and this strategy should not buy a form of legal immunity. The evidence that the City wanted to put in was not entirely devoid of probative value, especially the evidence that the defendants had promoted known Vrdolyak supporters. But allowing the evidence in would have extended the trial indefinitely since the parties would have wanted to delve into the circumstances surrounding each personnel action. This is just the sort of situation in which trial judges must exercise an informed judgment under Fed. R. Civ. P. 403 which in this age of extraordinarily heavy judicial caseloads we will rarely be disposed to disturb. Cf. *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 929 (7th Cir. 1984).

The compensatory damages were heavy, considering that Mrs. Pieczynski retained her job, salary, benefits, etc. in the face of the alleged campaign of harassment. Nevertheless Mrs. Pieczynski's doctor and priest as well as members of her family testified that she experienced severe emotional distress which aggravated an existing back condition and caused other physical suffering, extending over a period of years. Although as the City points out the damages awarded were greater than in other political harassment cases in this circuit, the other cases did not involve the same degree of emotional and physical distress. We cannot say that the damages awarded were *so* excessive—so "monstrously excessive," as the cases like to say—in the circumstances that the district judge was required to set the award aside. See *Cygnar v. City of Chicago*, 865 F.2d 827, 847-48 (7th Cir. 1989); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983). The tortfeasor takes his victim as he finds him (in this case her), so if the victim has a preexisting condition which the tort aggravates, the tortfeasor is liable for the full consequences. *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1294 (7th Cir. 1987); *Lancaster*

v. Norfolk & Western Ry., 773 F.2d 807, 820 (7th Cir. 1985); *Parrett v. City of Connersville*, 737 F.2d 690, 694-95 (7th Cir. 1984); *Stoleson v. United States*, 708 F.2d 1217, 1220-21 (7th Cir. 1983). The punitive damages were modest, assuming as we must that the defendants really did subject the plaintiff to a deliberate campaign of harassment perilous to her health, and did so for no better reason than that she supported an adversary of their political leader.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit